SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Textbooks

IN THE

Supreme Court of the United States

October Term, 1969
No. 4

EVELLE J. YOUNGER,

Appellant,

vs.

JOHN HARRIS, JR., *et al.*,

Appellees.

Appeal From the United States District Court for the Central District of California.

REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF ON REARGUMENT.[1]

Preliminary Statement.

1. Recent ruling of this Court:

In *Reetz v. Bozanich*, this Term, No. 185 (Feb. 25, 1970), ... U.S. ...., 26 L. Ed. 2d 68, 38 U.S. Law Week 4170, the state court was given no chance to adjudicate the issue under the provisions of the state constitution; that opportunity was accorded by the appellee Harris, in his filing appropriate proceed-

[1]This brief, in addition to replying to Appellant's Supplemental Brief on Reargument, will discuss briefly the latest ruling of this Court (made subsequent to our last brief); and the relevancy of the six cases, which are presently set for argument, following the instant cause.

We do this in the "Preliminary Statement" above.

ings, before repairing for relief in the United States District Court, both in the California Court of Appeals and in the Supreme Court of California, in which he challenged the California Criminal Syndicalism Act both on its face and as applied, not only as offending the United States Constitution, but because violating the Constitution of the State of California. (See copy of Petition for Writ of Prohibition [page 13 of Memorandum of Points and Authorities in Support of Petition] lodged with the Clerk of this Court. Under California procedure, all documents filed in the State Court of Appeals are transferred to the California Supreme Court upon the filing in that Court of a Petition for Hearing. [Rule 28(b), California Rules of Court.])

2. The cases presently set for argument, in this Court, following this case:

a. In none of them was relief sought and pursued in the state courts, including the appellate courts of the state, prior to seeking redress in a United States District Court.

Specifically:

i. New York has no provision, as does California, that a copy of the transcript of the Grand Jury proceedings be furnished to a defendant. (Calif. Penal Code §938.1) (See Reply Brief After Argument by appellant Fernandez in *Fernandez v. Mackell,* No. 20, p. 22. The foregoing statement in *Fernandez* is applicable also to *Samuels v. Mackell,* No. 11.)

The California procedure provides for a review in the California Courts, including California's Court of

Appeal and Supreme Court, by way of a Petition for a Writ of Prohibition, to challenge not only the sufficiency of the evidence, but the constitutionality of the statute under which the indictment was filed. (See *Moore v. Municipal Court,* 170 Cal. App. 2d 548, 339 P. 2d 196; *Hunter v. Justice's Court,* 36 Cal. 2d 315, 323, 223 P. 2d 465.) As to the latter, in California, prohibition is the counterpart of habeas corpus. (170 Cal. App. 2d at 553).

ii. Hence, the argument made in this Court in *Dyson v. Stein,* No. 565, by appellant (Brief for Appellant, p. 28), that appellant there could (and should) have sought habeas corpus in the state courts, has no application to the case here. As does not the claim made in *Boyle v. Landry,* No. 6 (see opinion of the District Court, *Landry v. Daley,* 280 F. Supp. 938, 946) that constitutional attack on the statutes should have been made in the criminal cases pending in the state courts, pursuant to the procedures available for that purpose under Illinois law.

iii. For the foregoing reasons, moreover, it can not be said that: "In this case, a Federal District Court stepped into the middle of a pending state criminal prosecution . . ." Mr. Justice Black in *Byrne v. Karalexis,* No. 1149, 396 U.S. 976, 982.

On the contrary, here, not until after taking and coming to the end of a road for judicial relief in the California State Courts—a State road specifically built by state statute, affording judicial redress after indictment and *prior* to trial—did appellee Harris turn to a United States District Court.

I.

This Is Not a Case for Abdication by a United States District Court (Reply to Appellant's Point C; pp. 11-13).

What actually happened in this case is the same as though a formal order of abstention had been made by the District Court.[2] It is to be remembered that the judge-made (*Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496) abstention doctrine does not call for the district court to dismiss the action (although some courts have [see f.n. 4, *Zwickler v. Koota,* 389 U.S. 241 at 244]), but rather to retain jurisdiction to enable the plaintiff to go to the state courts in order that he may come back to the federal court if necessary (*ibid.;* and see cases in f.n. 10 of *Zwickler,* 389 U.S. at 248). In effect, that is what happened here. The case is just as though the plaintiff Harris, immediately upon being indicted, had gone to the federal court seeking an injunction against the prosecution on the ground of the unconstitutionality of the statute. Had the district court at that time decided to abstain, its proper order would have been to "retain the bill pending a determination of proceedings to be brought with reasonable promptness in the state court." (*Railroad Commission v. Pullman Co., supra,* 312 U.S. at 501-502.) Plaintiff having done that without success, as this record shows, he would be entitled to the federal court's disposition of his claim. (*Cf. England v. Louisiana State Board of Medical Examiners,* 385

[2]In *Reetz v. Bozanich, supra,* .... U.S. ...., 26 L. Ed. 2d 68, 72, this Court said:

"We think the federal court should have stayed its hand while the parties repaired to the state courts . . ." This, in effect, is precisely what the Trial Court and appellee Harris did here.

U.S. 411.) Appellant can not complain because appellee applied "self-abstention" and went directly to the state court without awaiting an order so to do by the federal court. Surely, the abstention doctrine is not a merry-go-round.

Appellant states in his Supplemental Brief (p. 11, f.n. 2) that "[t]he state trial court was never afforded an opportunity to narrow the meaning of the Penal Code section 11401(3) by limiting instructions," citing *Brandenburg v. Ohio,* 395 U.S. 444, 448. We assume appellant means instructions to the jury. If he does, the statement is true, but so what? Limiting jury instructions is not the only way a court may narrow a statute. (A trial itself may be without a jury.) The point is that the state trial court was given the opportunity to so do on the "Section 995" motion, and by demurrer; but it failed to, saying merely "The Court finds that it is of the opinion the statute involved is not unconstitutional and therefore the Demurrer is overruled. Defendant's motion under Section 995 Penal Code is denied." (Minutes of Dec. 1, 1966; Ex. C to Petition for Writ of Prohibition in California District Court of Appeal; Appendix to Appellee's Supplemental Brief, lodged with the Clerk of this Court.)

And the California Court of Appeal and Supreme Court affirmed and were equally silent.

Appellant asserts (f.n. 2, p. 11, Supplemental Brief) that "[t]he state appellate courts did not pass upon the merits of the constitutional challenge in denying Harris a writ of prohibition, for the writ is discretionary," citing no case or other authority. In the first place, even if the writ is discretionary (which, as we point out below, it is not), that does not assist appel-

lant in its "abstention" argument. Even appellant uses the term "opportunity" as being what the state court must be afforded under the asserted abstention doctrine (*ibid.*). And the state courts here had just that.[3] Whatever may be said of the advantages of the abstention principle (see Appellant's Supplemental Brief, pp. 5-6), it surely cannot be stretched to require that the state courts be given two bites at the apple before a federal court will be permitted to exercise its jurisdiction. This should be especially evident where a speech-inhibiting statute is involved.

Moreover, California's "995" and writ of prohibition procedure are *not* discretionary. The process is a carefully delineated one, designed specifically to prevent California defendants from being put to the "unreasonable expense, inconvenience, and delay" (*Greenberg v. Superior Court*, 19 Cal. 2d 319, 323, 121 P. 2d 713) and the "grave injustice" of being "required to undergo the ordeal, ignominy and expense of a trial" (*Jensen v. Superior Court*, 96 Cal. App. 2d 112, 118, 214 P. 2d 828) where evidence of an essential element of the crime has not been adduced before the grand jury (*ibid.*): and where a state statute is unconstitutional on its face (*Moore v. Municipal Court, supra*, 170 Cal. App. 2d 548, 552-3, 339 P. 2d 196), or as applied (*Patterson v. Municipal Court*, 232 Cal. App. 2d 289, 294, 42 Cal. Rptr. 769). In such a case, "the court . . . is without jurisdiction to proceed" (*Parks v. Superior Court*, 38 Cal. 2d 609, 615, 241 P. 2d 521); the "indictment is void and confers no jurisdiction upon a court to try a person for the offense charged." (*Green-*

[3]The District Court below expressly noted this. [R. 21.]

berg, supra, 19 Cal. 2d at 322.) For it "encroaches upon the right of a person to be free from prosecution for crime unless there is some rational ground for assuming the possibility that he is guilty" (*ibid.*). In California "a court is without jurisdiction to subject a citizen to criminal prosecution for violation of an unconstitutional statute." (*In re Berry,* 68 Cal. 2d 137, 145, 65 Cal. Rptr. 273, 436 P. 2d 27; see, also, *Moore v. Municipal Court, supra,* 170 Cal. App. 2d 548, 552, 339 P. 2d 196: "The most recent cases recognize that the requirement that a defendant in a criminal case stand trial by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public." And [170 Cal. App. 2d at 553], "submission to trial [under an unconstitutional statute] and appeal from an adverse judgment would not be an adequate remedy.")

California Penal Code Section 995 provides that "[t]he indictment . . . *must* be set aside (where) . . . the defendant has been indicted without reasonable or probable cause." (Emphasis added.) And Section 996 provides that if the 995 motion is not made "the defendant is precluded from afterwards taking the objections mentioned in Section 995." This means that if evidence of an essential element of the offense was not adduced before the grand jury (or before a committing magistrate) and the defendant fails to make a 995 motion, the prosecution may cure the defect at trial and the defendant cannot complain. (*People v. Bryant,* 256 Cal. App. 2d 470, 472, 64 Cal. Rptr. 86.) But it likewise means that if the element is lacking before the grand jury and the defendant does make a 995 motion,

the prosecution will not be heard to say it will cure the matter with proof at trial. (*Buck v. Superior Court*, 245 Cal. App. 2d 431, 433, 54 Cal. Rptr. 282: "[I]f the People have left gaps in their proof, which could be filled by additional evidence, their remedy is to resubmit the matter to a magistrate or to a grand jury; they cannot supplement their proofs by additional evidence on the motion under 995 or in this court.")

Anticipating that despite the mandatory requirement of Section 995, there would be occasions where trial courts would not grant 995 motions, the California legislature provided for review of such denials by prohibition. Section 999a provides in pertinent part:

> "A petition for a writ of prohibition, predicated upon the ground that the indictment was found without reasonable or probable cause . . . must be filed in the appellate court within 15 days after a motion made under Section 995 . . . has been denied by the trial court. . . . The alternative writ shall not issue until five days after the service of notice upon the district attorney and until he has had an opportunity to appear before the appellate court and to indicate to the court the particulars in which the evidence is sufficient to sustain the indictment . . ."

Accordingly, under this California statute, the issuance of the writ is not discretionary; and the cases so hold. Thus, in *Buck, supra*, "if the evidence before . . . the grand jury does not meet the test of sufficiency the motion *must* be granted and a denial will be overturned here." (245 Cal. App. 2d at 433) (Emphasis added.) In *Badillo v. Superior Court*, 46 Cal. 2d 269, 271, 294

P. 2d 23: "[I]n such a case the trial court should grant a motion to set aside the information (Pen. Code §995), and if it does not do so, a peremptory writ of prohibition *will* issue to prohibit further proceedings. (Pen. Code §999a.)" (Emphasis added.) *Rollins v. Superior Court,* 223 Cal. App. 2d 219, 223, 35 Cal. Rptr. 734: " '[U]nless (the evidence, there, before the committing magistrate) affords a rational ground for assuming the possibility that the person charged is guilty, he is *entitled* to a writ of prohibition to prevent further proceedings against him." (Emphasis added.) And *Murphy v. Superior Court,* 188 Cal. App. 2d 185, 188, 10 Cal. Rptr. 176: "Inasmuch as under the facts presented, petitioner fell squarely within the purview of Penal Code, section 995 . . . respondent court should have granted her motion to set aside the information. Therefore, having proceeded timely under Penal Code, section 999a, she is *entitled* to have a peremptory writ of prohibition issue, restraining respondent court from further proceeding upon the matter." (Emphasis added.)

Appellant states (p. 11, Supp. Br. f.n. 2), that the clear and present anger test comes into play "after the facts surrounding the charged offense have been developed at trial," and that intent and incitement "are factual matters to be shown at trial." No authority is cited. What appellant forgets is that under the California procedure we have above outlined, *all* the elements of the offense have to be spelled out in the testimony submitted to the Grand Jury before a defendant will be required to stand trial. The deficiency cannot be cured at trial. (*Buck v. Superior Court, supra,* 245 Cal. App. 2d 431, 433, 54 Cal. Rptr. 282.)

In the case at bar, the record is that all the California courts allowed the prosecution to go forward, both because the statute was held by the trial court to be constitutional; and because it was deemed that all the constitutionally necessary elements of the speech offense had been presented to the grand jury. As we have seen, none of this is so.

Under the circumstances, it would have been a weird administration of federal justice for the district court to have abstained and to have sent the plaintiff before it, Harris, *back* to the state courts to seek relief. The case at bar is well within the recommendation of the American Law Institute's "Study of the Division of Jurisdiction Between State and Federal Courts" (1969), §1372(7), pp. 52, 308. In the case of a plainly unconstitutional state statute (as, we say, California's Criminal Syndicalism Act is), the ALI recommendation is that there need be no resort to the state courts at all.) How much clearer, then, should be the right to the injunction when, as here, the plaintiff has first gone to all the state courts.

In *Greenwood v. Peacock,* 384 U.S. 808, 829, the Court (per Mr. Justice Stewart) stated that if a state prosecution "would itself clearly deny (their) rights protected by the first Amendment, they may under some circumstances obtain an injunction in the federal court", citing *Dombrowki v. Pfister,* 380 U.S. 479.

This case is that circumstance.

And, the refusal by the District Court below to abstain, in the exercise of its discretion, certainly does "not operate to work a wholesale dislocation of the historic relationship between the state and the federal

courts in the administration of the criminal law," *Greenwood v. Peacock, supra,* at p. 831.

We suggest, too, that the rationale of *W.E.B. Du Bois Clubs of America v. Clark,* 389 U.S. 309, 311, may be applicable here—although at issue there was not, as here, abstention, with respect to a state court proceeding. There, Congress provided a way for appropriate parties "to raise their constitutional claims"; here, California also did so. There, it was not clear (at p. 312) that the statute applied to the objecting parties; here, there is no dispute by the appellant that it does to appellee Harris. There (*ibid.*), there was no effort to exhaust administrative remedies; here, there was every effort.

II.

The District Court Properly Declared Unconstitutional the California Criminal Syndicalism Act on Its Face. (Reply to Appellant's Point A; pp. 3-4).

Appellant apparently considers that the District Court struck down the remaining subdivisions of California Penal Code 11401, subdivisions 1, 2, 4 and 5, only because of the presence as plaintiffs of Dan and Hirsch, the members of the Progressive Labor Party, and of Broslawsky, the college history instructor. Appellant is mistaken. The court below issued no order concerning those plaintiffs. [R. 38]. Its only order was as to plaintiff Harris. [R. 17.] It is that order which is being presently reviewed in this Court.

Hence, plaintiffs Dan, Hirsch and Broslawsky are improperly appellees in this Court and the appeal as to them should be dismissed. We should have called

this expressly to the attention of the Court before now. Quite frankly, we fully realized that fact for the first time when we were preparing this Reply to appellant's Point A of his Supplemental Brief on Reargument.[4]

But the absence of plaintiffs Dan, Hirsch and Broslawsky in this Court does not detract from the proper action of the Court below in holding unconstitutional, as to Harris, the entire statute on its face.

In the first place, historically, it has been Criminal Syndicalism *Acts* which have been the subject of attention, and not merely particular subdivisions which prohibit, variously, advocating, justifying, printing, organizing or committing syndicalism (see, *e.g.*, Dowell, "A History of Criminal Syndicalism Legislation in the United States," LVII Johns Hopkins University Studies in History and Political Science, 1939; Kirchwey, "A Survey of the Workings of the Criminal Syndicalism Law in California," 1926; Whitten, "Criminal Syndicalism and the Law in California, 1919-1927", Transactions of the American Philosophical Society, New Series, Vol. 59, Part 2, 1969.[5] Even *Whitney v.*

---

[4]Subliminally, we apparently recognized it earlier for we filed the motion to affirm only on behalf of appellee Harris. However, in our Brief for Appellees, pp. 28-29, argument was made on behalf of the other three plaintiffs, as was also done in appellees' Supplemental Brief on Reargument, pp. 22-23. Why we did not realize then that appellant had no right to appeal as to Dan, Hirsch and Broslawsky, we cannot explain. But we are comforted by Mr. Justice Frankfurter's words, dissenting in *Henlee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600: "Wisdom too often never comes and so one ought not to reject it merely because it comes late." See, also, Mr. Justice Jackson, concurring in *McGrath v. Kristensen*, 340 U.S. 162, 177-178.

[5]These latter two documents, for the convenience of the Court, have been lodged with the Librarian of this Court.

California referred to "The Syndicalism Act", 274 U.S. at 372 (though only subdivision 4 was involved), as did this Court in *Brandenburg v. Ohio,* 395 U.S. 444, 448: "Ohio's Criminal Syndicalism Act cannot be sustained." And see the famous, or infamous, injunction in *In re Wood,* 194 Cal. 49, 52-53, which incorporated in one decree all the substantive subdivisions of the Act. In other words, "criminal syndicalism", the "doctrine or precept advocating, teaching or aiding and abetting" (Calif. Penal Code §11400), is what the crime is. The various subdivisions (in California, now set out in Penal Code 11401) are mere variations on the theme.

But, be that as it may, the subdivisions of Section 11401 make up just the kind of a statute, free speech-wise, which made it appropriate for the trial court to have considered them all, even though Harris was charged under just one (§11401[3]). This, under the theory of *Thornhill v. Alabama,* 310 U.S. 88, 97-98, that the existence of a statute, "which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . Where regulations of the liberty of free discussions are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."

The *Thornhill* doctrine was reiterated in *National Association for the Advancement of Colored People v. Button,* 371 U.S. 415, 432-433: "[I]n apprais-

ing a statute's inhibiting effect upon such (First Amendment) rights, this Court has not hesitated to take into account possible applications in other contexts besides that at bar." This, because of "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Moreover, the very nature of the statute is such that "extensive adjudications, under the impact of a variety of factual situations" (Mr. Justice White, for the Court, in *Baggett v. Bullitt*, 377 U.S. 360, 378) would be required to bring the statute within constitutional bounds. Just as "[a]bstention does not require this" (*ibid.*), neither does the fact that Harris was charged here under only one subdivision of the Act. We believe that this was the rationale of the Court in *Dombrowski v. Pfister, supra*, 380 U.S. 479, 491, citing *Baggett*, where this Court, after observing that "a series of criminal prosecutions" would "deal . . . as they inevitably must with only a narrow portion of the prohibition at any one time," said: "We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal. . . ."

Accordingly, it was proper, indeed, essential, that the entire statutory scheme be adjudicated.

III.

Bad Faith Has Characterized Prosecutions Under California's Criminal Syndicalism Act. (Reply to Appellant's Point B; pp. 5-11).

In his "Survey of the Workings of the Criminal Syndicalism Law of California," *supra,* Prof. Kirchwey concluded (p. 37) that it had been converted, in many instances, "by maladministration into an instrumentality of injustice and oppression"; that the trials "were in many instances characterized by methods calculated to bring serious reproach on the administration of the law in California"; that the prosecutions (at p. 12) reflected the "vindictive spirit of the community"; that in the trials, prosecutors offered (and the California trial courts received) evidence (at p. 16) "so irrelevant and at the same time so prejudicial, that, in an ordinary criminal trial, the prosecuting attorney would have been ashamed to offer it";[6] and that the prosecuting attorneys, in all but a very few notable instances, conducted the prosecutions with vindictiveness and "unscrupulous disregard of orderly and lawful procedure" (at p. 19).

Professor Whitten, in his study "Criminal Syndicalism and the Law in California: 1919-1927," *supra,* is essentially of the same view as Prof. Kirchwey. He concluded that convictions were secured due to the "class interests and bias of prosecuting officials"—and of others, too (at p. 63).

---

[6]The "evidence" deemed by the prosecution to be relevant, attached to the Brief by Appellant here is in the same pattern.

So Prof. Dowell, in "A History of Criminal Syndicalism Legislation in the United States," *supra*[7] arrived at the conclusion that "In California, the prosecutions under the criminal syndicalism law were more intense than in any other state and involved greater injustice." He likened the prosecutions to those under the "Federal-born Alien and Sedition Act of 1798" (at p. 14). This Court has already spoken as to that Act. (*New York Times v. Sullivan*, 376 U.S. 254, 274.)

Conclusion.

The order should be affirmed.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
FRANK S. PESTANA,
Attorneys for Appellees.

---

[7]Noted by this Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447.